INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Regulations involved	2
Statement	4
Argument	8
Conclusion	11

CITATIONS

Cases:

Barker Co. v. *Painters Union*, 281 U.S. 462	9
Denby v. *Berry*, 263 U.S. 29	10
Hammond v. *Hull, et al.*, 131 F. 2d 23, certiorari denied, 318 U.S. 777	10
Keim v. *United States*, 177 U.S. 290	10
Lake Charles Metal Tr. Council v. *Newport Industries*, 181 F. 2d 820	9
Lewis Publishing Co. v. *Wyman*, 228 U.S. 610	9
Mills v. *Green*, 159 U.S. 651	9
United States ex rel. Girard Trust Co. v. *Helvering*, 301 U.S. 540	10
United States ex rel. Roughton v. *Ickes*, 101 F. 2d 248	10
Wilbur v. *United States ex rel. Kadrie*, 281 U.S. 206	10
Woods v. *Malcolm-Dallyn Co.*, 177 F. 2d 414	9

Constitution and Regulations:

Constitution of the United States:	
Fifth Amendment	10
Army Regulation 600-355, issued July 17, 1942:	
Paragraph 6(b)	2, 6
Army Regulation 380-5, issued March 6, 1946:	
Paragraph 4	3
Paragraph 12	3
Paragraph 15	3

Miscellaneous:

Federal Rules of Civil Procedure:	
Rule 25(d)	8

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 701

CHARLES GORDON, PETITIONER

v.

WILLIAM E. BERGIN, INDIVIDUALLY AND AS ADJUTANT GENERAL OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the District Court for the District of Columbia (R. 14) is not reported. The *per curiam* opinion of the Court of Appeals for the District of Columbia Circuit (R. 19-20) is reported at 193 F. 2d 367.

JURISDICTION

The judgment of the Court of Appeals was entered on November 15, 1951 (R. 21). On February

12, 1952, Chief Justice Vinson extended the time for filing a petition for certiorari to March 12, 1952 (R. 34). On March 10, 1952, Mr. Justice Black further extended the time for filing to April 11, 1952 (R. 35). The petition was filed on April 11, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court below properly found that an action for a writ of mandamus was moot because all substantive objectives of the writ had been fulfilled.

REGULATIONS INVOLVED

1. Army Regulation 600-355 (Personnel, Arrest and Confinement), issued July 17, 1942, provided in pertinent part:

> 6. *Statements and reports.*
>
> * * * * *
>
> b. *By the commanding officer.* Whenever a commanding officer places an officer in arrest or confinement without preferring charges, he will make a written report of his action to the officer having general court-martial jurisdiction, who will call on the officer arrested or confined for any explantion he may desire to make and take such further action within his authority as he may think necessary. When trial is deemed inadvisable, the officer having general court-martial jurisdiction will forward all papers in the case to the Adjutant

General, through military channels, with a statement of action taken and reasons therefor. A copy of all papers will at the same time be sent to the officer arrested or confined, who may address to the Adjutant General direct any further statement or explanation he may desire to make. When no further action is contemplated by the War Department, the papers in the case or copies thereof will be filed with the officer's record and the officer so advised through military channels.

2. Army Regulation 380-5 (Military Security, Safeguarding Military Information), issued March 6, 1946, provided in pertinent part:

4. Categories. Official matter requiring classification shall be examined, graded, and marked top secret, secret, confidential, or restricted. Top secret is a special grading given to certain secret matter.

* * * * *

12. Dissemination of classified matter. No person is entitled solely by virtue of his grade or position to knowledge or possession of classified matter. Such matter is entrusted only to those individuals whose official duties require such knowledge or possession.

* * * * *

15. Responsibility. The safeguarding of classified military information is the responsibility of all military personnel, civilian employees of the War Department, and of the

management and employees of all commercial firms engaged in classified work or projects for the War Department. Classified military information will be disclosed only to military or civilian personnel having a legitimate interest therein.

* * * * *

STATEMENT

From September, 1945, to March, 1947, petitioner, a Lieutenant Colonel in the Army, was assigned to duty with the United States Military Government in Korea (R. 3). On April 18, 1947, after his return to the United States, he was arrested in the Pentagon and kept in confinement until July 25, 1947 (R. 3). On that date, and after the Commanding General of the Military District of Washington had decided not to bring petitioner to trial on charges made against him, petitioner was discharged from the Army under conditions other than honorable (R. 4, 9). Two weeks later, his Officer's Reserve Corps commission was rescinded (R. 4).

The following month, September, 1947, petitioner learned that various investigations had been made concerning his sending from Korea into the United States "twelve large wooden boxes in violation of the Customs laws", that full reports of these investigations had been forwarded to the Commanding General of the Military District of Washington, and that on the basis of these reports

the Commanding General had decided not to bring petitioner to trial but to separate him from the service (R. 4, 9).

On June 30, 1949, petitioner instituted a civil action for slander against Dong Sung Kim in the United States District Court for the District of Columbia, alleging that Kim had made slanderous statements concerning petitioner's activities in Korea (R. 24). Since the information in the above-described reports submitted to the Commanding General was deemed of value to petitioner in prosecuting his slander action, a subpoena was issued directing the Adjutant General of the Army, or his agent, to produce the "official records and reports of investigations and complaints" leading to petitioner's arrest, confinement and discharge from the Army (R. 24-25). Major Andrews appeared in response to the subpoena, brought with him the requested records and reports, and while testifying as to their contents insofar as they were relevant to the issues in the *Kim* case, refused to allow petitioner or his attorneys to inspect the papers (R. 17, 18, 25).[1] Major Andrews' refusal was based on reasons of "national security" and on the ground that the great majority of the file was "classified" and that disclosure "would be prejudicial to the interests of the Army, and to the individuals" (R. 16-17).

---

[1] The Kim slander suit resulted in a finding by the District Court for petitioner for $10,000 (R. 18).

Because of this refusal, a motion for an order to compel the Adjutant General to allow inspection of the official Army records was made in the slander suit, but denied by the District Court on September 7, 1949 (R. 25). The affidavit of petitioner's attorney shows that "it was for this reason" that on October 24, 1949, more than two years after petitioner's discharge, that a letter was sent to the Army, requesting compliance with Army Regulation 600-355, par. 6(b) *supra,* pp. 2-3 (R. 26).

This letter referred to petitioner's arrest and the Commanding General's determination that trial was inadvisable (R. 8-9). Relying on the Army Regulation, the letter requested a copy of all the papers and reports made available to the Commanding General concerning the arrest (R. 10). This request was denied by the Army on November 14, 1949 (R. 11).

Petitioner then brought the instant suit in the United States District Court for the District of Columbia, against the Secretary of the Army and the Army Adjutant General, seeking a writ of mandamus to compel those officials to comply with Army Regulation 600-355 by furnishing copies of the requested papers (R. 2-7). The complaint made no mention of the slander action or petitioner's desire to obtain the papers for his use in that action. Instead, the complaint alleged that the papers were necessary to enable petitioner "to adequately prepare a petition for the correction

of the nature of his unsatisfactory discharge from the Army without honor" (R. 7).

The Government moved to dismiss the complaint for failure to state a cause of action (R. 12). In support of the motion, a Government affidavit showed that virtually all of the papers requested were classified as "Confidential," that they contained information which was diplomatic in character and that the release of such information to petitioner was prohibited by Army Regulation 380-5 (Military Security, Safeguarding Military Information), *supra*, pp. 3-4 (R. 13). The District Court granted the Government's motion and dismissed the complaint on March 17, 1950 (R. 14).

While petitioner's appeal from this dismissal was pending in the court below, the Secretary of the Army, on application made by petitioner, approved the recommendations of an Army Board of Correction of Military Records and directed *inter alia* that:

> 1. Petitioner's Army records be corrected to show petitioner honorably discharged, and that a new and honorable discharge be issued him (R. 29).
>
> 2. A similar correction be made to show a terminal promotion to Colonel from Lieutenant Colonel (R. 29-30).
>
> 3. A correction be made to show his Reserve Commission had been revoked through error, and that a new Reserve Commission be given him (R. 30).

This action taken by the Secretary was brought to the attention of the court below (R. 29). In its opinion, that court noted that petitioner's Army records had been corrected to show an honorable separation from duty (R. 19). The opinion also pointed out that in the civil action for slander an official of the War Department had taken the witness stand and "testified as to the contents of the papers here involved, in so far as they did not involve matters affecting national security" (R. 20). Since it therefore appeared that "all substantive objectives which could be served by a writ of mandamus have been served", the court below dismissed the appeal as moot (R. 20, 21).[2]

ARGUMENT

The only question presented by this case is whether the facts before the court below were sufficient to support the court's holding that all of the substantive objectives of the requested writ of mandamus had been fulfilled and that the controversy had therefore come to an end and was moot. Since no conflict of decisions is even asserted and the issue is essentially a factual one, we submit that review here is not warranted.

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[2] The court also dismissed the action as to former Army Secretary Gray, who had been succeeded by Secretary Pace without any substitution being effected within the permissible six-month period. Rule 25(d), Fed. R. Civ. Procedure (R. 20). Although former Adjutant General Witsell, who also had been joined as a defendant, later resigned, his successor, William E. Bergin, the respondent here, was properly substituted (R. 20).

It cannot be denied that a federal appellate court will not do the vain thing of making a decision on questions which have become academic or moot. *Barker Co.* v. *Painters Union,* 281 U.S. 462; *Mills* v. *Green,* 159 U.S. 651. This is especially true in suits for injunctive or mandatory relief where an injunction if granted "would be ineffectual and any decision [which might be made] would not decide any actual controversies because such controversies have ceased to exist." *Woods* v. *Malcolm-Dallyn Co.,* 177 F. 2d 414, 416 (C.A. 8); *Lake Charles Metal Tr. Council* v. *Newport Industries,* 181 F. 2d 820 (C.A. 5); see *Lewis Publishing Co.* v. *Wyman,* 228 U.S. 610, 615.

Petitioner does not challenge these settled principles but endeavors to avoid their impact by alleging that the purposes which could have been served by a writ of mandamus have not been fulfilled. The record before the court below, however, disproves that claim. The record shows that the writ was desired to obtain information to be used for two purposes: (1) to prepare a petition to the Army for the correction of his unsatisfactory discharge and (2) to obtain testimony for use in his slander suit against Kim (R. 7, 25). Both of these objectives, as the above Statement shows (*supra,* pp. 5-7), were realized before the court below properly dismissed the appeal.

Nor is petitioner's argument that he has not been restored to active duty a sufficient basis to

support the appeal. The short answer to petitioner's contention is that he did not seek restoration to active duty in the complaint filed for a writ of mandamus (R. 2-7). In any event, there is no doubt that if such relief had been sought it could not have been granted in a mandamus action. The rule is a firmly established that a decision of an administrative officer involving the exercise of discretion and judgment cannot be set aside by process in the nature of mandamus. *Wilbur* v. *United States ex rel. Kadrie,* 281 U.S. 206; *Denby* v. *Berry,* 263 U.S. 29; *United States ex rel. Girard Trust Co.* v. *Helvering,* 301 U.S. 540; *Keim* v. *United States,* 177 U.S. 290, 292; *Hammond* v. *Hull, et al.,* 131 F. 2d 23 (C. A. D. C.), certiorari denied, 318 U.S. 777; *United States ex rel. Roughton* v. *Ickes,* 101 F. 2d 248 (C. A. D. C.). That the determination of Army officials as to the eligibility of an officer for restoration to duty calls for the exercise of such discretion and judgment is not open to serious question.[3]

[3] Since the sole issue here is whether the court below properly dismissed the case as moot, petitioner's argument that his 5th Amendment rights were somehow violated is not in point (Pet. 7).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 207801 1229